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SUPREME COURT, U.S.

NO. 80-6367

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ORIGINAL COPY

LINWOOD EARL BRILEY, Petitioner,

v.

COMMONWEALTH OF VIRGINIA, Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. ARE THE VIRGINIA STATUTES WHICH PROVIDE THAT MURDER WHICH OCCURS DURING THE COMMISSION OF A ROBBERY CAN BE CAPITAL MURDER OR FIRST DEGREE MURDER AN UNCONSTITUTIONAL VIOLATION OF A DEFENDANT'S RIGHT TO DUE PROCESS OF LAW BECAUSE THEY FAIL TO PROVIDE A MEANINGFUL BASIS TO DISTINGUISH BETWEEN THE FEW CASES IN WHICH CAPITAL PUNISHMENT IS INVOKED AND THE MANY IN WHICH IT IS NOT?

2. IS THE FAILURE TO GIVE A LESSER INCLUDED OFFENSE INSTRUCTION IN A CAPITAL MURDER CASE A VIOLATION OF THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

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ARGUMENT AGAINST GRANTING CERTIORARI

I.

THE VIRGINIA CAPITAL PUNISHMENT STATUTES ARE CONSTITUTIONAL

This Court has had numerous occasions to consider the constitutionality of Virginia's capital punishment statutes, and in each instance has refused to grant certiorari. Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978), cert. denied, 441 U.S. 967 (1979); Waye v. Commonwealth, 219 Va. 683, 251 S.E.2d 202, cert. denied, 442 U.S. 924 (1979); Mason v. Commonwealth, 219 Va. 1091, 254 S.E.2d 116, cert. denied, 444 U.S. 919 (1979); Clark v. Commonwealth, 220 Va. 201, 257 S.E.2d 784 (1979), cert. denied, 444 U.S. 1049 (1980); Coppola v. Commonwealth, 220 Va. 243, 257 S.E.2d 797 (1979), cert. denied, 444 U.S. 1103 (1980); and Stamper v. Commonwealth, 220 Va. 260, 257 S.E.2d 808 (1979), cert. denied, ___U.S.___, 100 S. Ct. 1666 (1980). The respondent believes that if this Court has not deemed it necessary to review the constitutionality of Virginia's capital punishment statutes in any of the cited cases, no reason exists in the present case for doing so.

In the present case Petitioner asserts that there exist no statutory guidelines for determining whether murder in the commission of robbery is capital murder under § 18.2-31(d) or first degree murder under § 18.2-32. A cursory review of the two statutes clearly illustrates the difference between them.

In order to commit the capital offense of murder in the commission of robbery under § 18.2-31(d), the murder must have been willful, deliberate and premeditated. Whereas murder in the first degree under § 18.2-32 may be shown if the homicide occurred in the commission of or attempt to commit robbery. This is the common felony-murder rule where the element of legal malice is supplied from the commission of the felony. There is no requirement under § 18.2-32 that such felony-murder must have been willful, deliberate and premeditated as is required in the capital offense. This distinction has been clearly recognized by the Virginia Supreme Court in the case of Ball v. Commonwealth, 221 Va. ____, 273 S.E.2d 790 (1981), cited by Petitioner.

The Petitioner also asserts that the Virginia capital punishment scheme is unconstitutional in that it permits only the "trigger man" or principal in the first degree, except in cases of murder for hire, to be convicted of capital murder. See, § 18.2-18. Petitioner appears to urge that everyone, no matter how remotely connected to the murder, must be subject to capital punishment. Such a position flies in the face of the holdings in this Court. In both Gregg v. Georgia, 428 U.S. 153 (1976), and Jurek v. Texas, 428 U.S. 262 (1976), this Court noted that Georgia and Texas had acted to narrow the class of murderers subject to capital punishment. The Commonwealth of Virginia has reserved the possibility of

capital punishment only for those who actually commit the murder. Those who are merely functionaries in the crime, but who under normal principles of criminal law would be treated in the same manner as the principal in the first degree, are not subject to capital punishment. It would appear that Petitioner is condemning the Commonwealth for her refusal to cast the capital punishment not so broadly as to ensnare the hapless lookout. An analogous argument has been rejected in Gregg, supra, wherein this Court noted that it would be totally alien to our notions of criminal justice to require prosecuting authorities to charge a capital offense whenever arguably there had been a capital offense. 428 U.S. at 199 n. 50.

The Petitioner also maintains that Virginia's capital punishment statutes are arbitrary, capricious and illogical since capital punishment is not provided for in cases of homicides committed during burglaries, sodomy and like offenses. Respondent submits that this argument is foreclosed by Gregg and Jurek. Section 18.2-31 is patterned after the Texas capital punishment statute upheld in Jurek. The Virginia statute limits the imposition of the death penalty to a narrowly defined group of the most brutal crimes, and this Court has never suggested that the death penalty must be available for all murders. Such questions are clearly within the province of the legislative branch of government.

II.

INSTRUCTIONS ON LESSER INCLUDED OFFENSES IN CAPITAL CASES ARE NOT REQUIRED ABSENT SUPPORTING EVIDENCE.

Neither the Virginia capital punishment statutes nor case law prohibit the giving of an instruction on lesser included offenses in capital cases. Virginia law is very clear, however, that instructions must be supported by the evidence. This case, therefore, does not present the situation where a trial court is prohibited from giving an instruction on lesser included offenses which this Court found to be impermissible in Beck v. Alabama, ___ U.S. ___, 100 S. Ct. 2382 (1980).

In the present case the Petitioner denied all complicity in both the robbery and the killing. Beck does not require that instructions on lesser included offenses be given. Rather Beck supports the principle that instructions on lesser included offenses are required only when the evidence would support such an instruction. In the opinion this Court noted that in federal courts as well as state courts a defendant is entitled to an instruction on a lesser included offense where the evidence warrants it. Nowhere in the opinion does this Court suggest that such instructions must be given when not supported by the evidence. In Beck, the State of Alabama conceded that except for the statutory prohibition the evidence would have supported the giving

of an instruction on a lesser included offense. See, footnote 5.

The Petitioner argues that the Virginia Supreme Court assumed the role of fact finder when it upheld the trial court's determination that if the jury believed the Petitioner robbed the victim at the Log Cabin, then, as a matter of law, the robbery continued until the murder on Mayo Island. The facts in this case established that no more than 15 to 20 minutes elapsed from the time the victim was seized at the Log Cabin until he was shot on Mayo Island. The uncontradicted evidence in this case established that the robbery and murder were part of one continuous episode. See, People v. Ketchel, 538 P.2d 394 (Cal. 1963); Bizup v. People, 371 P.2d 786 (Colo. 1962); State v. Harley, 543 S.W.2d 288 (1976).

CONCLUSION

For the reasons stated, Respondent respectfully submits that the Petition should be denied.

Respectfully submitted,

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